Supreme Court, U.S.
FILED

96 201 JUL 1 1996

OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States
October Term, 1996

GARTH CONLAN,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR

Respondent,

On Petition for Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Garth Conlan, *pro se*
A Farmer and Farm Landowner
P.O. Box 970
Capitola, California 95010
(408) 462-5974

58 pp

QUESTION PRESENTED

UNDER THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (MSPA) TITLE 29 U.S.C. 1801 et seq CERTAIN FARMERS ARE HELD EXEMPT FROM LIABILITY UNDER THE MSPA. 29 U.S.C. 1803(a)(1). THE QUESTION PRESENTED IS:

SHOULD AN INNOCENT LANDOWNER BE HELD RESPONSIBLE UNDER THE MSPA ACT FOR THE VIOLATIONS OF A **MSPA EXEMPT** FARMER LESSEE?

PARTIES TO THE PROCEEDINGS

THE PETITIONER IS GARTH CONLAN, LANDOWNER IN THE SALINAS VALLEY OF CALIFORNIA.

THE RESPONDENT IS THE UNITED STATES DEPARTMENT OF LABOR.

TABLE OF CONTENTS

QUESTIONS PRESENTED.....I

PARTIES TO THE PROCEEDINGS.....ii

TABLE OF CONTENTS.....iii-iv

ARGUMENT.....1

PETITION FOR A WRIT OF CERTIORARI.....1

OPINIONS BELOW.....1

JURISDICTION.....1

PERTINENT CONSTITUTIONAL PROVISION.....2

STATEMENT OF THE CASE.....2-8

EXHIBIT A-1 9

EXHIBIT A-2.....10

EXHIBIT B.....11-13

TABLE OF CONTENTS-Continued

APPENDICES

Appendix A: Amicus Curiae Brief of Ronald V. Dellums, Member, House of Representatives, Ninth District, California in support of Garth Conlan, Defendant-Appellant.....1a

Appendix B: Opinion of Department of Labor Office of Administrative Judges- dated March 9, 1993.....15a

Appendix C: Order of District Court Affirming DOL Decision, dated April 19, 1994.....20a

Appendix D: Order of District Court Of Appeals Affirming District Court Order, dated February 2, 1996.....21a

Appendix E: Order of District Court Of Appeals Denying Rehearing, dated April 4, 1996.....32a

Appendix F: Amicus Curiae Brief of Western Growers Association In Support of Garth Conlan.....33a

ARGUMENT

THIS COURT SHOULD GRANT REVIEW BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS MADE A MISTAKE ON AN IMPORTANT QUESTION OF FEDERAL LAW THAT SHOULD BE SETTLED BY THIS COURT.

PETITION FOR A WRIT OF CERTIORARI

GARTH CONLAN RESPECTFULLY PETITIONS THIS COURT FOR A WRIT OF CERTIORARI TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ENTERED IN THE ABOVE-CAPTIONED CASE ON FEBRUARY 2, 1996.

OPINIONS BELOW

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT IS REPORTED AT 76 F. 3d 271, 275 (9TH CIRCUIT 1996) CONLAN V. DEPARTMENT OF LABOR

JURISDICTION

THE DECISION IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT WAS FILED AND ENTERED ON FEBRUARY 2, 1996. A PETITION FOR REHEARING WAS FILED AND DENIED APRIL 4, 1996.

THE JURISDICTION OF THIS COURT IS INVOKED UNDER SUPREME COURT RULE 10(c).

PERTINENT CONSTITUTIONAL PROVISION

THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROVIDES IN PERTINENT PART: A PERSON SHALL NOT "BE DEPRIVED OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW" WHICH PROTECTS AGAINST THE USE OF GOVERNMENTAL POWER IN CONTRAVENTION OF TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE. UNDER THE MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (MSPA) TITLE 29 U.S.C. CERTAIN FARMERS ARE HELD EXEMPT FROM LIABILITY UNDER THE MSPA. 29 U.S.C. 1803 (a)(1) WHILE THE INNOCENT LANDOWNER IS HELD RESPONSIBLE FOR VIOLATIONS OF A **MSPA EXEMPT** FARMER LESSEE.

STATEMENT OF THE CASE

I AM NOT A LAWYER. I AM ONE OF THE DIMINISHING AMERICAN FARMERS, A SECOND GENERATION FARMER ON MY FAMILY FARM IN THE GREAT SALINAS VALLEY OF CALIFORNIA.

THANK GOD WE LIVE IN THE UNITED STATES OF AMERICA, AND HAVE A CONSTITUTION THAT ALLOWS A SMALL FARMER TO DEFEND AGAINST AN ARBITRARY, OPPRESSIVE GOVERNMENTAL AGENCY. A CONSTITUTION THAT GIVES ME AN OPPORTUNITY TO MAKE A PERSONAL APPEAL TO THE HIGHEST COURT IN MY COUNTRY, AFTER I HAVE EXHAUSTED A FORTUNE IN LEGAL FEES, DEFENDING MYSELF AND MY WIFE AGAINST A COURT DECISION THAT IS

NOT LOGICAL, IS NOT FAIR, AND INFRINGES UPON PROPERTY RIGHTS OF EVERY SINGLE LANDOWNER IN THE UNITED STATES.

IF THIS DECISION IS ALLOWED TO BECOME THE LAW OF THE LAND, IT WILL DESTROY NOT ONLY THE FAMILY FARMS ACROSS AMERICA, BUT THE RIGHTS OF ALL LANDOWNERS, BECAUSE IT PUTS AN UNREASONABLE BURDEN ON EVERY FARMER AND LANDOWNER TO PATROL AND POLICE HIS LAND AND BUILDINGS TWENTY-FOUR HOURS A DAY.

I, GARTH CONLAN, AM A LIFELONG FARMER. MY WIFE AND I WORK FROM SUN UP TO SUNDOWN ON BEHALF OF OUR BELOVED FARM . WE HAVE SURVIVED ALL THE BIBLICAL TRIALS OF FARMING, AND EVEN CHAPTER 11 BANKRUPTCY, WHERE WE PAID BACK EVERY SINGLE CREDITOR IN FULL WITH INTEREST.

I WORKED AND LIVED IN THE HOG BARN AT CALIFORNIA POLYTECHNICAL UNIVERSITY AT SAN LUIS OBISPO, FEEDING AND ATTENDING THE DELIVERY OF THE SOWS, AND I HAVE WORKED MANY OVERNIGHTS UNLOADING BOXCARS TO EARN MY BACHELOR OF SCIENCE COLLEGE DEGREE IN ANIMAL SCIENCE.

I HAVE NEVER ASKED FOR OR RECEIVED ANY GOVERNMENTAL AID OR SUBSIDY FOR FARM OR OTHERWISE. I HAVE SERVED TWICE IN THE UNITED STATES ARMY, AND I HAVE RAISED THREE CHILDREN.

DURING THE TEN YEARS WHEN OUR FARM WAS IN CHAPTER 11, UNDER THE JURISDICTION OF THE BANKRUPTCY COURT, LAND LEASES WERE MANDATED AND APPROVED REQUIRING ALL TENANTS TO PERFORM THE TERMS OF THEIR LEASES, "ACCORDING TO ALL COUNTY, STATE, AND FEDERAL LAWS." I HAD NO EMPLOYEES AND I WAS NOT IN THE BUSINESS OF PROVIDING HOUSING FOR ANYONE.

THE ENTIRE FARM WAS IN DEFERRED MAINTENANCE DURING THE TEN YEARS OF BANKRUPTCY (1984-1994), INCLUDING THE SUMMER COMPOUND SURROUNDING MY MOTHER'S SUMMER COTTAGE AT THE **WEST** END OF THE 1500 ACRE FARM. THE COMPOUND CONSISTED OF BUILDINGS PRESERVED BECAUSE OF THEIR HISTORICAL SIGNIFICANCE, MY MOTHER'S COTTAGE WHERE SHE SPENT HER HONEYMOON WITH MY FATHER, A **DUPLEX** THAT SERVED AS A SUMMER CAMP OUT FOR MY CHILDREN WHEN MOTHER WAS IN RESIDENCE, A HISTORICAL RAILROAD BOXCAR, A TRAILER AND SOME HISTORICAL FARM EQUIPMENT, PRESERVED FOR 4-H CLUBS.

THE MARQUEZ BROTHERS, HELD ONE OF THE BANKRUPTCY COURT'S APPROVED LEASES. THESE FOUR ADULT SUCCESSFUL BACHELOR BROTHERS LIVED WITH THEIR PARENTS IN WATSONVILLE, BUT WERE ON THE FARM ALMOST 24 HOURS A DAY TENDING THEIR EXTENSIVE LEASED STRAWBERRY ACREAGE (APPROX. 150 ACRES).

BECAUSE MY MOTHER WAS IN THE HOSPITAL

AUGUST 1988, SHE WAS NOT TAKING HER USUAL AND CUSTOMARY SUMMER STAY AT HER HOUSE IN THE COMPOUND AT THE FARM, SO THE CHILDREN WERE NOT STAYING IN THE **DUPLEX** AND TRAILERS EITHER.

THE MARQUEZ BROTHERS ASKED IF THEY COULD STAY AT THE **DUPLEX** FOR NIGHT REST PERIODS WHILE IRRIGATING CROPS.

BECAUSE OF THE CHAPTER 11 CONDITION, AND THE DEFERRED MAINTENANCE, I RECEIVED TACIT PERMISSION, FROM THE BANKRUPTCY COURT TO ALLOW THEM TO USE THE **DUPLEX** ONLY IF THEY REPAIRED THE BUILDING AND BROUGHT IT UP TO COUNTY BUILDING CODE AT THEIR EXPENSE INSTEAD OF RENT. THEY AGREED THAT THEY WOULD FOLLOW ALL GOVERNMENTAL RULES OF COUNTY, STATE, AND FEDERAL GOVERNMENT, AS WAS REQUIRED BY THEIR LAND LEASES.

MOTHER'S ADJOINING COTTAGE WITH A RUSTIC FACADE TO DISCOURAGE VANDALISM, HAD BEEN MAINTAINED BY HER IN AN IMMACULATE CONDITION, WITH TWO BATHS, THREE BEDROOMS, ALL ELECTRIC KITCHEN, AND DECORATED WITH A LIFETIME COLLECTION OF PRECIOUS FARM ANTIQUES.

WHILE THE MARQUEZ BROTHERS REPAIR OF THE **DUPLEX** WORK WAS IN PROGRESS, CERTAIN MONTEREY COUNTY OFFICIALS WHO EARLIER HAD UNSUCCESSFULLY ATTEMPTED TO CONDEMN A PART OF OUR FARM FOR A COUNTY PARK,

GATHERED A SMALL ARMY OF COUNTY PLANNING AND BUILDING OFFICIALS, IMMIGRATION SERVICE PEOPLE, T.V. CAMERA OPERATORS, AND THEN INVITED THE DEPARTMENT OF LABOR, CARL LAING, TO JOIN THEM IN A "RAID" OF OUR FARM AFTER AERIAL SURVEILLANCE HAD REVEALED PEOPLE LIVING UNDER SOME TREES ON THE **EAST** SIDE OF THE FARM IN A DENSE OAK GROVE, (SEE MAP OF RANCH EXHIBIT A-1 & A-2)

WITHOUT NOTIFYING ME OF TRESPASSERS DISCOVERED ON MY FARM, AS IS THE CUSTOM BY COUNTY ORDINANCE, AN ALL ENCOMPASSING SEARCH WARRANT WAS OBTAINED (SEE EXHIBIT B). OUR ENTIRE 1500 ACRE FARM AND ALL BUILDINGS WERE THOROUGHLY SEARCHED AND PHOTOGRAPHED AND VIDEOED COMPLETE WITH DEMEANING REMARKS BY THE CAMERA OPERATORS.

MY WIFE AND I WERE AT THE HOSPITAL BEDSIDE OF MY MOTHER ABOUT THIRTY MINUTES AWAY FROM THE FARM WATCHING THE EVENING NEWS WITH MOTHER WHEN WE WERE SHOCKED BY THE VIDEO TAPE OF OUR FARM SHOWING MOTHER'S BELOVED COTTAGE "RED TAGGED" AS A "LABOR CAMP UNFIT FOR HUMAN HABITATION". MOTHER WAS SO DISTRESSED SHE DIED SHORTLY AFTER THAT.
THE COUNTY OF MONTEREY HAVING INITIATED THIS UNFAIR EVENT AND AN **ADDITIONAL UNSUCCESSFUL LAWSUIT AGAINST ME AND MY WIFE**, THEN HANDED THE EVENT OVER TO THE DEPARTMENT OF LABOR.

THE DEPARTMENT OF LABOR CLAIMS TO HAVE FOUND SOME PEOPLE LIVING IN THE **DUPLEX** THE MARQUEZ'S WERE REPAIRING. THESE "PEOPLE" WERE NEVER PROPERLY IDENTIFIED, WE WERE NEVER ALLOWED TO INTERVIEW OR CROSS EXAMINE OR EVEN VERIFY THEIR EXISTENCE.

DEPARTMENT OF LABOR REPRESENTATIVE CARL LAING, TESTIFIED THEY WERE SOMEHOW CONNECTED TO THE MARQUEZ WORK CREW, BUT THEN TESTIFIED THAT THE MARQUEZ BROTHERS WERE **EXEMPT** FROM THE MSPA ACT, BUT WE AS LANDOWNERS ARE STRICTLY LIABLE UNDER THE MSPA ACT, FOR THEIR PRESENCE.

I HAVE BEEN HELD RESPONSIBLE FOR A LESSEE'S VIOLATION OF THE MSPA ACT WHILE THE LESSEES HAVE BEEN DECLARED EXEMPT UNDER THE ACT.

THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT HAS MADE A MISTAKE IN HOLDING A FARMER IN BANKRUPTCY, OPERATING UNDER THE STRICT OVERSIGHT OF THE BANKRUPTCY COURT, RESPONSIBLE FOR THE ACTS OF A LESSEE, WHEN THE LESSEE HAS BEEN DECLARED EXEMPT FROM THE LAW.

THIS IS NOT REASONABLE, NOR LOGICAL, IT IS UNFAIR, WRONG, AND IS BAD LAW THAT THE HIGHEST COURT OF MY COUNTRY SHOULD REVIEW.

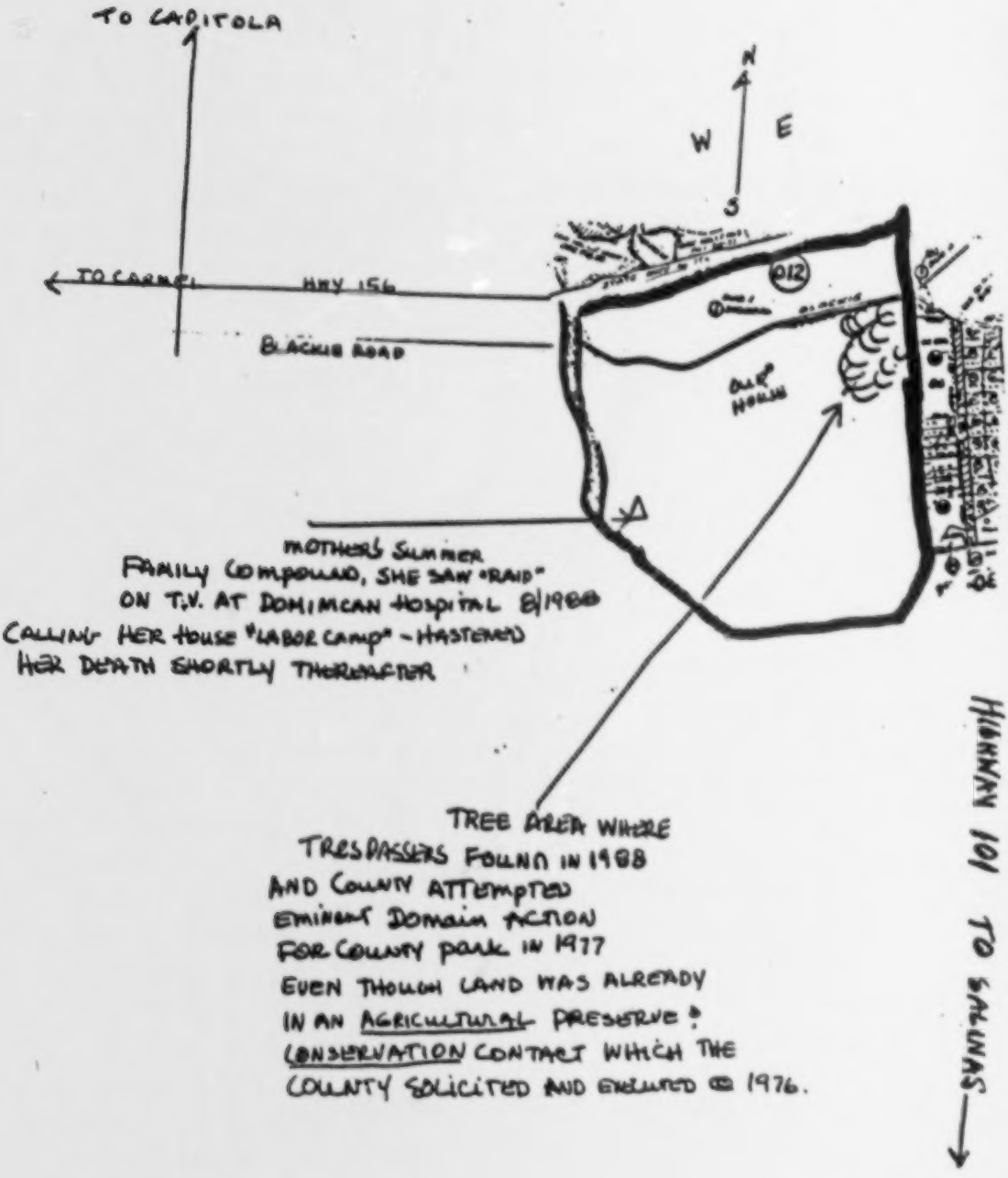
CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED AND THE JUDGEMENT OF THE NINTH CIRCUIT HOLDING ME LIABLE FOR CONDITIONS FOUND AT THE "DUPLEX" REVERSED.

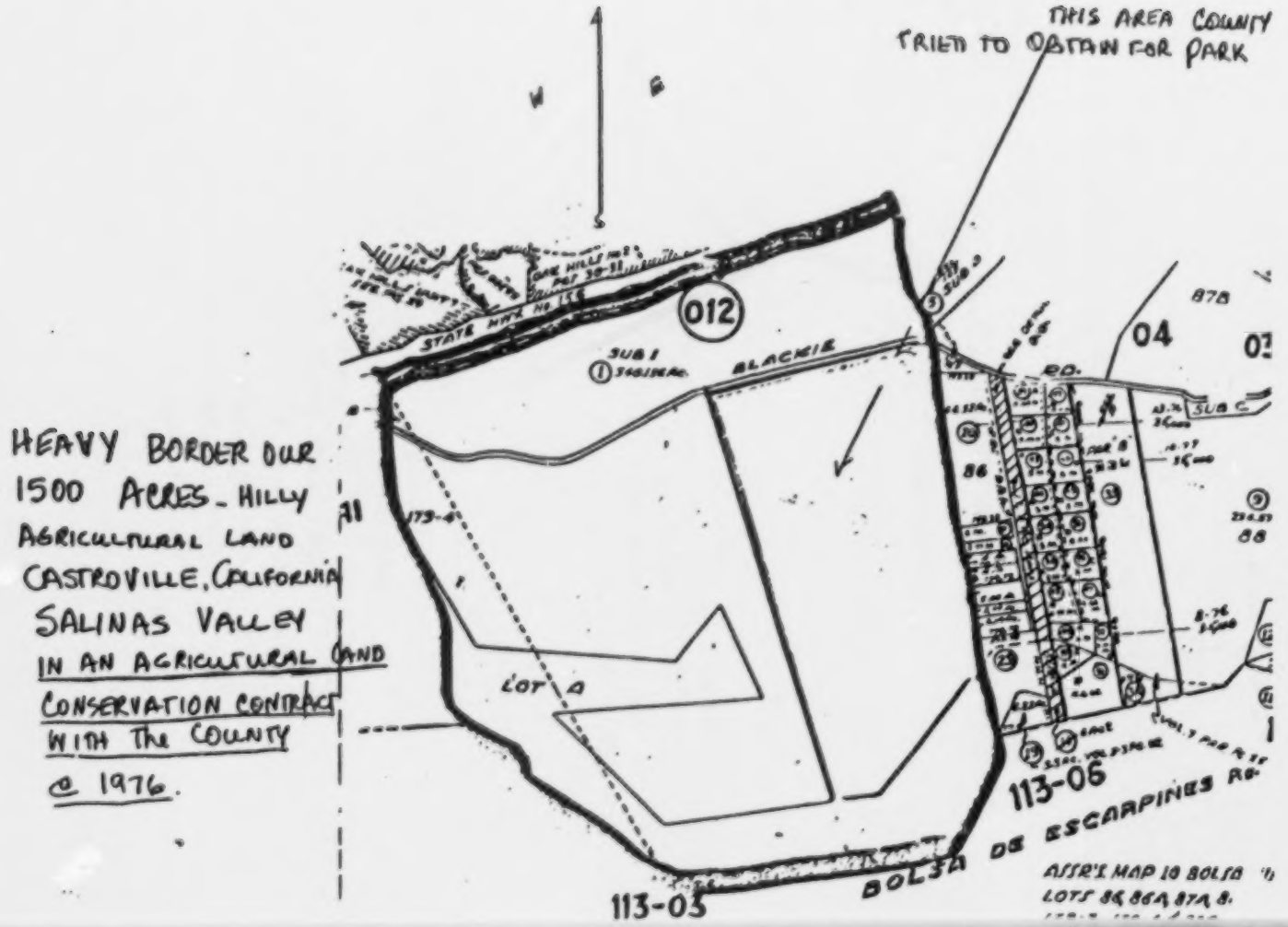
RESPECTFULLY SUBMITTED,

GARTH CONLAN
P.O. BOX 970
CAPITOLA, CALIFORNIA 95010
(408) 462-5974

EXHIBIT A-1



BEST AVAILABLE COPY



HEAVY BORDER OUR 1500 ACRES - HILLY AGRICULTURAL LAND CASTROVILLE, CALIFORNIA SALINAS VALLEY IN AN AGRICULTURAL LAND CONSERVATION CONTRACT WITH THE COUNTY © 1976.

EXHIBIT B

(REPRODUCTION OF SEARCH WARRANT)
IN THE COURT OF JUDICIAL DISTRICT
COUNTY OF MONTEREY, STATE OF CALIFORNIA
SEARCH WARRANT

STATE OF CALIFORNIA)
) ss.
COUNTY OF MONTEREY)

THE PEOPLE OF THE STATE OF CALIFORNIA TO ANY SHERIFF, CONSTABLE, MARSHAL, POLICEMAN, OR PEACE OFFICER IN THE COUNTY OF MONTEREY:

PROOF BY AFFIDAVIT, HAVING BEEN MADE THIS DAY BY (1) CAROLYN ANDERSON THAT THERE IS PROBABLE CAUSE FOR BELIEVING THAT (2) GARTH G. CONLAN IS IN VIOLATION OF MONTEREY COUNTY CODE SECTIONS: 20.92.090 (D) BY CUTTING OF OAK TREES WITHOUT A PERMIT; IN FURTHER VIOLATION OF MONTEREY COUNTY CODE SECTION 20.48.030 (B) BY MAINTAINING OR ALLOWING A LABOR CAMP WITHOUT A USE PERMIT, VIOLATION OF MONTEREY COUNTY CODE SECTION 10.41.020, UNLAWFUL ACCUMULATION OF TRASH, GARBAGE, DEBRI AND FECAL MATERIAL, VIOLATION OF CALIFORNIA HEALTH AND SAFETY CODE SECTION 25154, UNLAWFUL HANDLING, STORAGE, USE AND DISPOSAL OF HAZARDOUS MATERIAL, VIOLATION OF CALIFORNIA HEALTH AND SAFETY CODE SECTION 17030, OPERATION OF LABOR CAMP WITHOUT A VALID HEALTH PERMIT, VIOLATION OF CALIFORNIA HEALTH AND SAFETY CODE SECTION 17060,

OPERATION A SUBSTANDARD LABOR CAMP, BY PERMITTING (14) FOURTEEN TO (20) TWENTY FARM WORKERS TO RESIDE IN MAKESHIFT CARDBOARD VINYL-SCRAP LUMBER SHELTERS UNDER THE TREES AT THE CONLAN RANCH AKA LIGHTNING FARMS, 15740 BLACKIE ROAD, NORTH MONTEREY COUNTY, ASSESSOR'S PARCELS 133-012-01, 133-013-01, 133-013-02 AND 133-013-03 CONSISTING OF 1505 ACRES FRONTING NORTHERLY AND SOUTHERLY OF BLACKIE ROAD. THAT THE FARM WORKERS ARE OCCUPYING UNSAFE SHELTERS AND ARE CREATING A HEALTH AND SAFETY HAZARD, AS WELL AS A FIRE HAZARD FOR THEMSELVES AND THE IMMEDIATE COMMUNITY. YOU ARE THEREFORE COMMANDED TO MAKE IMMEDIATE SEARCH OF THE PREMISES SITUATED (5) APN 133-012-01 DESCRIBED AS A PARCEL OF 340.130 ACRES, APN 133-013-01 DESCRIBED AS A PARCEL OF 537 ACRES, APN 133-013-02 DESCRIBED AS A PARCEL OF 368 ACRES, AND APN 133-013-03 DESCRIBED AS A PARCEL OF 260 ACRES LOCATED IN A RURAL AREA OF NORTH MONTEREY COUNTY AND KNOWN AS LIGHTNING FARMS, THE CONLAN RANCH AND THE GAVER RANCH, INCLUDING ALL FARM DWELLINGS, RANCH ACCESSORY BUILDINGS, AGRICULTURAL STORAGE BUILDINGS, GARAGES, AND ANY OUTBUILDINGS OF ANY KIND, TRASH CONTAINERS OR PESTICIDE CONTAINERS FOR THE FOLLOWING PROPERTY (6) ARTICLES OF PERSONAL PROPERTY, INCLUDING BUT NOT LIMITED TO ARTICLES OF GROOMING, PERSONAL HYGIENE, CLOTHING, FOOD, FOOD PREPARATION MATERIALS AND UTENSILS, MATTRESSES, BLANKETS, PALLETS, CARDBOARD BOXES, CROP FUMIGATION, VINYL SHEETING, ALL

INDICATING THAT WORKERS HAVE CONSTRUCTED SHELTERS AND ARE OCCUPYING THE PREMISES. ALSO FRESH OAK TREE STUMPS, DRYING VEGETATION, RECENTLY GRADED AND CLEARED LAND, INDICATING UNLAWFUL LAND CLEARING ON STEEP AND ERODIBLE SLOPES, AS WELL AS PESTICIDES AND CONTAINERS USED TO STORE PESTICIDES AND OTHER HAZARDOUS MATERIALS, ALSO SOIL SAMPLES FROM AREAS WHERE WORKERS ARE FOUND TO BE LIVING AND HAVE SIGNS OF CHEMICAL DUMPING. ALL OF THE ABOVE ARE TO ASCERTAIN THE EXTENT OF VIOLATIONS OF HEALTH AND SAFETY, HOUSING, ZONING, FIRE IMMIGRATION, AND U.S. LABOR LAWS BEING COMMITTED AND IF YOU FIND THE SAME OR ANY PART THEREOF, TO BRING IT FORTHWITH BEFORE ME AT THE AFORESAID COURT.

GIVEN UNDER MY HAND AND DATED THIS ___ DAY OF Aug 11, 1988, 1988.

By /s/ Donald A. Thomas

JUDGE OF SAID COURT

APPENDIX A

[Filed December 8, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES DEPARTMENT OF LABOR

Plaintiff-Appellee,

v.

GARTH G. CONLAN

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF AMICUS CURIAE OF THE HONORABLE RONALD V. DELLUMS, MEMBER, U.S. HOUSE OF REPRESENTATIVES, NINTH DISTRICT, CALIFORNIA IN SUPPORT OF DEFENDANT-APPELLANT

THE HONORABLE RONALD V. DELLUMS
Member, U.S. House of Representatives
Ninth District, California
1301 Clay Street, Suite 1000N
Oakland, California 94612
Telephone: (51) 763-0370

Amicus Curiae in Support of Defendant-Appellant

TABLE OF CONTENTS

I. INTRODUCTION: A CONSENSUS BILL TO PROTECT MIGRANT FARM WORKERS AND ITS UNINTENDED INTERPRETATION BY THE DEPARTMENT OF LABOR.....5a

II. POINTS OF UNDISPUTED FACT.....7a

III. FUNDAMENTAL FAIRNESS REQUIRES REVERSAL OF THE DISTRICT COURT'S ORDER BECAUSE CONLAN DID NOT PROVIDE HOUSING TO TRESPASSERS.....8a

IV. THE SECRETARY'S INTERPRETATION OF MSPA IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO CONLAN.....11a

V. CONCLUSION.....13a

TABLE OF AUTHORITIES

CASES

Burham v. Superior Court of California
495 U.S. 604 (1990).....

Matter of U.S. Department of Labor v. Cross, No. 90-MSP-62, [Wage Hour} Lab. L. Rep. (CCH) Admin. Ruling [32,236] (ALJ, February 12, 1993.....

Pacific Mutual Life Insurance Company v. Haslip, 499 U.S. 1 (1991).....

Saintida v. Tyre, 783 F.Supp.1368 (S.D.Fla. 1992)...

Screws v. United States, 325 U.S. 91 (1945).....

United States v. Westbrook, 817 F.2nd 529 (9th Cir. 1987).....

United States v. X-Citement Video, Inc., ____U.S. ___, No. 93-723 (Nov. 29, 1994)....

STATUTES

29 U.S.C. 1800 et seq.....

29 U.S.C. 1841 (a) and (b).....

29 U.S.C. 1853 (a)(1).....

TABLE OF AUTHORITIES-Continued

PERIODICALS AND PUBLICATIONS

H.R. Report No. 97-885, at 4, 97th Cong., 2nd Sess. 1, reprinted in (1982) U.S. Code Cong. and Ad. News 4547.....

John Calvin Jeffries, Jr. & Paul B. Stephan III, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L.J. 1325, 1376 (1979).....

H.R. Report No. 97-885, at 4, 97th Cong., 2nd Sess.1, reprinted in [1982} U.S. Code Cong. & Ad. News 4547.....

Pursuant to the Rule 29 of the Federal Rules of Appellate Procedure, RONALD V. DELLUMS, Members of the United States House of Representatives, hereby respectfully files this brief amicus curiae as an "officer" of the United States.

I. INTRODUCTION: A CONSENSUS BILL TO PROTECT MIGRANT FARM WORKERS AND ITS UNINTENDED INTERPRETATION BY THE DEPARTMENT OF LABOR.

The power of the Congress to remedy wrongs through its lawmaking function is one of three democratic legs upon which the unique genius of our system of government stands. That Constitutional power is far-reaching, and nearly always exercised with circumspect caution.

By passage of the Migrant and Seasonal Farm Worker Act of 1983, the Congress sought to protect migrant farm workers from the appalling abuses and mistreatment that have been their lot for generations. 29 U.S.C. 1800 et seq. The Act was introduced in the Congress as a consensus bill, indicating that all interested parties from landowners to family farmers viewed the compass of the act with approval.

However, the purpose of the Act was not to punish landowners or agricultural employers for acts of others and of which they cannot be aware and, therefore, are powerless to prevent. Neither I, nor my colleagues would have support such strict liability for this type of problem. Indeed, the legislative history reveals that the Department of Labor "testified that this Act will allow it to concentrate its enforcement personnel on true abuses." See H.R. Report No. 97-885, at 4, 97th Cong., 2nd Sess.1, reprinted in [1982} U.S. Code & Ad. News 4547/

On occasion, however, the intent expressed by the Congress in a comprehensive legislative plan, and by the agency charged with administering the plan, may be subverted by an overly zealous interpretation of a statute as enforced by local agency officials. The unfortunate result may be a punitive and unnecessarily harsh enforcement of statutes quite appropriately designed to protect a vulnerable class. In effect, the shield intended to protect the innocent become a sword that wounds the equally innocent.

This is one such case. The individual landowner subject to, what I believe to be, an unreasonable and unprecedented exercise of the discretion granted by the Congress to the Secretary of Labor to enforce the migrant worker housing safety statute in appellant Garth Conlan, I have taken the unusual step of supporting his appeal because I believe an injustice has been done him.

Mr. Conlan, as a landowner, was found by an administrative law judge to have been unaware, and incapable of becoming aware--even by vigilance--of the existence of migrant workers trespassing on his land. (1)

(1) Mr. Conlan is also now appealing fines in connection with another structure on his property known as the "duplex". I believe the arguments developed here are equally applicable to those fines, because Mr. Conlan also did not give permission to his tenant to use the duplex unless it was renovated. In this brief I will, however, restrict myself to violations found by the agency at the makeshift tent encampment erected by trespassers, which do not appear to be even remotely justifiable.

The problem with the heavy fines levied against him by the Department of Labor is that it punishes Mr. Conlan for something he could not know or prevent, a circumstance the Congress did not intend. Mr. Conlan did not "provide housing" to the campers within the meaning of the statute because he was not aware of their existence. At most, he can only be characterized as a involuntary provider because he owned the land on which the trespassers camped. I do not believe the Congress intended to impose strict liability on a landowner such as Mr. Conlan solely because he owns land upon which others squat without rights. Nor has there been a single prior decision or agency interpretation construing the Act to require this result. The Court writes on a clean slate.

Finally, I believe that if the Secretary's interpretation of MSPA is upheld, the MSPA housing statute will have been enforced against Mr. Conlan in an unconstitutionally vague manner. Properly read to avoid vagueness problems, the statute includes a scienter requirement, both to prevent injustice and to accurately reflect the intent of Congress in passing the statute.

II. POINTS OF UNDISPUTED FACT

Several relevant points are undisputed in this appeal. First, Mr. Conlan was not farming his property when it was raided. See District Court Order Affirming Decision of Administrative Law Judge ("Order") at 1. Nor did he ever employ seasonal workers. He always used full-time employees in his pre-bankruptcy farming operation, Lightning Farms. Second, and critically, it is undisputed in this case that Mr. Conlan had absolutely no knowledge that any area of his property was being used to provide tent housing for anyone. See Order at 3; Decision of Administrative Law Judge ("Decision") at 14. In fact, the Administrative Law Judge explicitly found that

there was not basis to infer that Mr. Conlan knew of the existence of the trespassers, or of their homemade tents. See Decision at 14 ("[B]ecause the property is extensive and hilly, I find it cannot be inferred that Mr. Conlan had such knowledge [of the tent housing].")

Third, it is undisputed that Mr. Conlan had never violated MSPA in the past, had acted in good faith in attempting to comply with the Act thereafter, and was never given an opportunity to comply with the Act prior to being fined. See Decision at 20.

Nothwithstanding these findings, the ALJ still found Mr. Conlan liable for the fine solely because he was the owner of the property on which the trespassers camped, concededly without his permission or knowledge. Id.

III. FUNDAMENTAL FAIRNESS REQUIRES REVERSAL OF THE DISTRICT COURT'S ORDER BECAUSE CONLAN DID NOT PROVIDE HOUSING TO TRESPASSERS

Mr. Conlan's fines for housing violations over tent housing are without precedent. It is beyond dispute that he did not know the campers were present. When the campers were discovered, and after the fines were levied, the trespassers were disbursed and their makeshift encampment removed. See RT 483:16-484:16. The irony of this enforcement action to remediate non-existing migrant housing cannot be overstated.

The Due Process Clause of the Fifth Amendment protects against the use of governmental power in contravention of traditional notions of fair play and substantial justice. See Burnham v. Superior Court of California, 495 U.S. 604, 619

(1990) (whether the due process permits assertion of personal jurisdiction based on physical presence); see also Pacific Mutual Life Insurance Company v. Haslip, 499U.S. 1, 14-15 (1991) (whether due process violated by excessive punitive damages award). (2)

No lesser authority than this Court has affirmed one of the bedrock principles of our government in an analogous circumstance under OSHA:

> Fundamental fairness would require that one charged with and penalized for a violation be shown to have caused or at least to have knowingly acquiesced in, that violation. Under our legal system, to date at least, no m is held accountable or subject to fine, for the totally independent act of another.

Brennan v. Occupational Safety and health Review Com'n, 511 F.2d 1139, 1144 (9th Cir. 1975) (court must read scienter requirement into civil statute to avoid unfair result); see also United States v. X-Citement Video, Inc., ___U.S. ___, No. 93-723 (Nov. 29, 1994) ("knowingly" mental state read into criminal statute to prevent "positively absurd" and unfair results).

---

(2) In the criminal context, the issue of liability without fault is anathema to our legal system. See John Calvin Jeffries, Jr. & Paul B. Stephan III, Defenses, Presumptions, and Burden of Proof in the Criminal Law, 88 Yale L.J. 1325, 1376 (1979) ("As a question of principle...there can be little doubt of the morally objectionable character of liability without fault or of its inconsistency with the traditional Anglo-American concept of fairness to the individual.")

The issue joined is straightforward: Mr. Conlan was not aware that these campers existed. How then can he be deemed to have provided them with housing under MSPA? See, e.g., 29 C.F.R. 500.130 (a) ("providing the housing for any migrant agricultural worker.") The answer must be that he cannot. Or, alternatively, if he is viewed as an involuntary provider, no liability attaches to his involuntary status.

Under MSPA, no rationale is expressed in the language of the statute, or implied in the legislative record, that would reveal congressional intent to find landowners to be housing "providers" -- and strictly liable for the condition of such housing -- and strictly liable for the condition of such housing -- when the migrants are violating the law by seeking shelter on the property without the owner's permission or knowledge.

To the contrary. As noted in appellant's opening brief, the House of Representatives Report took pains to survey likely situations in which housing is "provided" under MSPA:

> The Committee is aware that the term "provides" is not defined in the Act. As with other such terms the Committee intends that it be given its plain meaning. The use of the term includes, but is not limited to situations where an entity makes housing available to workers, procures housing for the workers' use, or furnishes housing.

See H.R. Rep. No. 97-885, 97th Cong., 2nd Sess. 1 (1982), reprinted in U.S. Code Cong. & Admin. News 4547. Mr. Conlan's case does not fall under any of these examples.

I cannot believe my colleagues in the Congress intended to include unauthorized use of property, which could not be

detected as a "plain meaning" of the term "provides." See Matter of U.S. Department of Labor v. Cross, No. 90-MSP-62, [Wage Hour] Lab. L.Rep. (CCH) Admin. Ruling 32,236 (ALJ, February 12, 1993) ("[A] gratuitous overnight stay is not what the Congress intended to regulate" under 1823).

I also note, as did appellant, that this Court is not without an analogous statute against which to test the reasonableness of the agency's interpretation. The section of MSPA governing the safety of transportation provided to migrant workers tracks the structure of the housing statute, 1823, and repeats its emphasis on the term "provides."

Under 29 U.S.C. 1841 (a) and (b), to use "any vehicle for providing transportation" of migrant or seasonal agricultural workers, an entity must "ensure that such vehicle conforms to the standards prescribed by the Secretary ... and other applicable Federal and State safety standards." The elected representatives of the Congress would be shocked to learn that a landowner had been fined by the agency for the unauthorized used of a truck by a migrant worker. See, e.g., Sainida v. Tyre, 783 F. Supp. 1368, 1373-74 (S.D.Fla. 1992) (MSPA safety provisions not triggered unless responsible party "actually provides the transportation.")

Fundamental fairness and statutory construction suggest that landowners in Mr. Conlan's involuntary position as the owner of land on which trespasser camped not be subject to civil fines for the conduct of others.

IV. THE SECRETARY'S INTERPRETATION OF MSPA IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO CONLAN

Statutes should not be enforced against ordinary citizens

when they do not provide suitable notice as to what conduct is prohibited. Nor should they be enforced in an arbitrary or potentially vindictive manner. I believe that interpretation used by the agency in its action against Mr. Conlan creates an unconstitutional vagueness in the statute, an action that leads to absurd results.

Mr. Conlan was entitled to notice that he could be fined for not knowing about trespassers, who also happened to be migrants, i.e., as an involuntary provider. The words "commits a violation" in 29 U.S.C. 1853 (a)(1) do not give any warning whatever. But neither is there a scienter or mental state requirement to give teeth to the prohibition: "[T]he requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid." Screws v. United States, 325 U.S. 91,101 (1945).

Mr. Conlan was also entitled to notice that he could be fined for not doing anything other than owning his land. Nothing in the statute tells him he will be deemed a provider of housing merely because certain individuals choose to take temporary shelter in a obscure area of his ranch without permission. See United States v. Westbrook, 817 F.2nd 529, 532 (9th Cir. 1987) (statutes vague if "no standard of conduct is specified at all.") Such notice of a strict liability standard for landowners would have compelled him to search even the most remote and inhospitable areas of his property, which would have led to the discovery and eviction of the trespassers.

This Court can avoid the vagueness defect by interpreting the statute as I believe the Congress intended. Landowners should be subject to fines only if they are found to have voluntarily provided the housing. I do not believe the

Congress intended to punish individuals who own land and unintentionally become involuntary providers.

Nor did the Congress expect that MSPA would become a tool or lever in local property disputes. But the enforcement of the housing provision against Mr. Conlan in connection with the tent encampment is very possibly the out come of such a dispute with local officials of Monterey County. These officials apparently neglected to inform Mr. Conlan of the existence of trespassers known to them. The ensuing criminal investigation and raid unfortunately smack of a arbitrary and selective enforcement of a statute designed for nobler and different purposes.

These three considerations suggest that, as applied to Mr. Conlan, the Agency's interpretation of MSPA's housing provisions results in an unconstitutionally vague statute.

V. CONCLUSION

I have taken the unusual step of appearing as a friend of the Court in support of Garth Conlan. I do so because I am familiar with this case and because this Court stands in a position to remedy what I believe to b the patent unfairness of the agency's enforcement action against him and its incompatibility with the clear purpose and intent of the Congress. The importance of statutory protections for migrant workers is not at issue here. At stake is a simple principle: citizens of this Nation should not be subjected to forced and fundamentally unfair interpretations of statutes which punish them arbitrarily and without warning.

DATED: December 8, 1994

Respectfully Submitted,
RONALD V. DELLUMS
Member of Congress

By /s/ Ronald V. Dellums

Amicus Curiae in Support
Of Defendant-Appellant
Garth Conlan

APPENDIX B

[Filed March 9, 1993]

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

91-MSP-0037

THE UNITED STATES DEPARTMENT OF LABOR,
Plaintiff

vs.

LIGHTNING FARMS,
and
GARTH CONLAN
and
IONE CONLAN,
Respondents.

DECISION AND ORDER

ROBERT D. KAPLAN, Administrative Law Judge:

It is ORDERED that Lightning Farms and Ione Conlan be, and they hereby are, dismissed from this matter as they are not liable for the civil money penalty.

It is ORDERED that Garth Conlan pay a civil money penalty in the amount of $23,250.00 to the United States Department of Labor.

CONTENTIONS OF THE PARTIES

The Government contends that GARTH CONLAN is liable for MSPA violations discovered on August 11, 1988 because he was the owner of subject property or controlled it. The Government asserts that a relationship between the migrant farm workers found on the property and Mr. Conlan existed through the tenant farmers on the property. The Government states that the penalty of $23,250 it seeks is appropriate because the violations found on the property were substantive, and aggravated and serious and that the amounts assessed were "fair and reasonable."

The Government contends that the tenant farmer on who's premises the housing violation on the west side of the farm occurred, Juan Marquez, is exempt under the MSPA Act, but Garth Conlan as the Landowner is strictly liable.

Respondents contend that no violations of the Act have been proved since the people who camped on the east side of the farm were trespassers and were present without knowledge and consent and that evidence fails to establish that the persons who were using the housing on the west side and other facilities were migrant agricultural workers. In addition, they never appeared in person at the hearing, and all the evidence was second hand statements written in English for them by the Department of Labor Representative, Carl Laing, who did not speak Spanish. Further, these persons were never authenticated by alien photo card, registration number, driver's license, social security cards or fingerprints and there whereabouts were unknown.

In addition, respondents assert that Mr. Conlan is not liable because the property was occupied without his knowledge or permission and the raid was instigated by an overbroad

Monterey County search warrant initiated by a zoning official with a land use grudge who failed to notify the landowner of trespassers observed on the premises.

DISCUSSION

There was a raid conducted by the County of Monterey at the Conlan Ranch on tent housing on the east side of the farm where tents were observed by county officials by aerial and other surveillance that housed several people on the west side of the farm. An occupied permanent house (known as the "duplex") was found to be in general dilapidation. Respondents do not deny that farming by tenant farmers was taking place on the property at the time of the raid. However, the Respondents argue that no violations of the Act have been proved because the evidence fails to establish that the person who were using the housing and other facilities were migrant agricultural workers. The respondents had given control of the "duplex" to Juan Marquez and his brothers, one of the tenants, for their personal use during night time use while watering their crops. Mr. Marquez had indicated that he would fix-up the facility for his use. One person apprehended by officials during the raid was found to be an illegal alien and was sent back to Mexico the same day. Written statements were taken from seven other persons found on the property. The statements were written up in English by the DOL representative Carl Laing who did not speak Spanish. These Spanish speaking persons did not speak or write English. Two of the seven statements written up by Mr. Laing stated the persons resided under the trees and another that he was living in the "duplex" with eight other people.

The Administrative Judge found that some of the persons lived under the trees on the property. Respondents argued that the

Government had failed to prove that housing for migrant agricultural workers was provided. The Government found that Mariniano Reyes was a migrant agricultural worker and that migrant workers were provided housing on the property in the both the duplex and the makeshift tents and that conditions on the property were in violation of the Act and relevant regulations. Neither Mariniano Reyes or any other persons whose statements were produced at the hearing appeared and their existence and whereabouts are unknown.

Section 203(a) of the Act requires a person who "owns or controls" property used as housing for migrant agricultural workers comply with certain safety and health standards.

The farm was owned by the Conlan family and had been leased to approximately 40 tenant farmers who paid rent for the land use. Lightning Farms and Ione Conlan, Garth Conlan's wife, were not held as being liable and were dismissed.

Garth Conlan argues that, although he was the owner of the property, his is not responsible for the violations because if the property was used for housing people, it was done without his knowledge or permission. There was no evidence that Mr. Conlan had first hand knowledge that the area of the property where the tents had been set up was being used to house migrant agriculture workers. Also, due to the extensive and hilly land, it was found that Mr. Conlan had no knowledge of the tent housing and that county officials did not inform him of their presence which they knew of for some time.

The record does establish that he gave Juan Marquez and his brothers permission to use, without cost, the "duplex". Mr. Conlan indicated that he could not repair or bring it up to code, because of his Chapter 11 condition, and that if Mr. Marquez wanted to occupy it, he must bring it

up to code.

Mr. Marquez has been held to be an exempt family farmer under the MSPA Act but the Act and the regulations impose "strict liability" upon the owner of the property and that proof of knowledge or intent is not required. Mr. Conlan contends that the statute requires scienter or knowledge to be present. The Government held that scienter or knowledge was not a prerequisite for the violation and though Mr. Marquez is exempt, Mr. Conlan is not.

The DOL charged Mr. Conlan with penalties totaling $23,250.

APPENDIX C

[Filed April 19, 1994]

UNITED STATE DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

C-93-20226 RMW (PVT)

GARTH CONLAN,

Appellant,

vs.

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

This case is before the Court for review of the final decision of the Secretary of Labor ordering Appellant Garth Conlan ("Conlan") to pay a civil penalty of $23,250.00 for violations of the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. 1801 et seq. For the reasons set forth below, the decision of the Secretary of Labor is AFFIRMED in its entirety.

For The Court
Richard W. Wieking
Clerk

By /s/ Ronald M. Whyte
United States District Judge

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GARTH CONLAN,
Plaintiff-Appellant,
v.
UNITED STATES DEPARTMENT OF LABOR,
Defendant-Appellee.

No. 94-15878
D.C. No. CV-93-20226-RMW
OPINION

Appeal from the United States District Court
for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted
November 14, 1995—San Francisco, California

Filed February 2, 1996

Before: William A. Norris, Robert R. Beezer,
and Stephen S. Trott, Circuit Judges.

Opinion by Judge Beezer

SUMMARY

Government Law/Housing

The court of appeals affirmed in part a district court order, reversed in part, and remanded. The court held that a ranch owner was improperly penalized under the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) for housing conditions at an unauthorized camp on his property, where

there was no evidence in the record that anyone other than migrant workers themselves provided the housing in which they lived.

Appellant Garth Conlan owns a ranch. He leased most of his property to tenant farmers and occupied a personal residence on the property. Migrant workers were residing on Conlan's ranch in substandard conditions. Migrant workers had established an unauthorized camp consisting of shelters made of cardboard and plastic sheets. No water system or sewage system served the camp, and garbage accumulated. On a corner of the ranch, migrant workers were living in a structurally inadequate, dilapidated building (the duplex); farm workers were permitted to live there by one of Conlan's tenant farmers, Juan Marquez, Jr. Neither the camp nor the duplex was visible from Conlan's residence, and county agencies did not inform him that migrant workers were occupying shelters on the property.

Appellee the United States Department of Labor (DOL) assessed a civil penalty against Conlan for violating the housing safety and health provision of the MSPA. An administrative law judge (ALJ) ordered Conlan to pay a civil money penalty of $23,250 assessed by the DOL. Title 29 U.S.C. § 1853(a), a section of the MSPA, provides for civil money penalties for violations of the MSPA and states that a person who "commits a violation" of the chapter may be assessed a civil money penalty of no more than $1,000 for each violation. Section 1823(a) provides that a person who owns or controls a facility or real property that is used as "housing for migrant agricultural workers" is responsible for ensuring that the facility or real property complies with certain standards.

The district court affirmed the decision of the ALJ. Conlan appealed, contending that he did not know that migrant workers were living in the camp and the duplex.

[1] Conlan was incorrect in arguing that § 1853(a) should be interpreted to include a scienter requirement. [2] The section does not contain scienter language.

[3] The DOL interpreted § 1823(a) to allow imposition of liability upon finding that a person is an owner of a substandard facility or real property upon which migrant workers reside. [4] Under the DOL's interpretation, however, the liability possibilities were incredible. [5] Section 1823(a) contains the language "used as housing *for* migrant agricultural workers," not "used as housing *by* migrant agricultural workers." The plain meaning was that the housing must be provided to the migrant agricultural workers by someone other than themselves. Someone in control of the facility or property must use it to house the workers.

[6] Conlan was correctly penalized for the conditions found at the duplex. The facility was used by Marquez "as housing *for*" migrant workers. [7] However, Conlan was improperly penalized for the housing conditions at the unauthorized camp. There was no evidence in the record that anyone other than the migrant workers themselves provided the housing in which they lived. [8] It was clear that Conlan did not provide the housing, [9] and it could not be said that Conlan's tenant farmers housed the migrant workers in the camp.

[10] Sections 1853(a) and 1823(a) were not unconstitutionally vague.

[11] The case was remanded to the district court for elimination of the portion of the penalty attributable to the conditions at the unauthorized camp.

COUNSEL

Richard T. Tarrant, Bartko, Tarrant & Miller, San Francisco, California, for the plaintiff-appellant.

Paula Wright Coleman, United States Department of Labor, Washington, D.C., for the defendant-appellee.

OPINION

BEEZER, Circuit Judge:

Garth Conlan appeals the district court's order affirming the final decision of the Secretary of Labor imposing a civil money penalty of $23,250. Conlan was penalized for violating the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"). Conlan owned a facility and real property that, unbeknownst to him, were used by migrant agricultural workers as housing. The housing did not comply with federal and state health standards. Conlan contends that the district court erred in upholding the penalty. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part, reverse in part, and remand.

I

Garth Conlan owns a ranch of 1500 acres, more or less, in Monterey, California. Although at one time he farmed the ranch, Conlan discontinued farming in 1984 and began leasing most of his property to tenant farmers. Conlan occupied a personal residence on the property.

In the summer of 1988, individuals working for the Monterey County Planning Department and the Monterey County Health Department discovered that migrant workers were residing on Conlan's ranch in substandard conditions. Along the eastern border of the Conlan ranch, migrant workers had established an unauthorized camp consisting of 30 to 50 shelters made of cardboard and plastic sheets. No water system or sewage system served the camp. Garbage and sewage had accumulated in the area. On the southwest corner of the ranch,

migrant workers were living in a structurally inadequate, dilapidated building (the "duplex"). Farm workers were permitted to live there by Juan Marquez, Jr., one of Conlan's tenant farmers. Neither the unauthorized camp nor the duplex was visible from Conlan's residence. The county agencies did not inform Conlan that migrant workers were occupying shelters on the property.

On August 11, 1988, acting on information received from county agencies, United States Department of Labor ("DOL") investigators entered the Conlan ranch pursuant to a search warrant. Based on the evidence garnered from the search, the DOL assessed a civil penalty against Conlan for violating the housing safety and health provision of the MSPA.[1] 29 U.S.C. §§ 1823(a), 1853(a). After a hearing, an administrative law judge ("ALJ") ordered Conlan to pay the civil money penalty of $23,250 assessed by the DOL. The district court affirmed the ALJ's decision.

Conlan contends that he did not know that migrant workers were living in the camp and the duplex. Further, he contends that he specifically instructed Marquez as a tenant farmer that Marquez could not use the duplex unless and until he brought it "up to code." The ALJ found that there was no evidence that Conlan knew of the unauthorized camp and that it could not be inferred that Conlan had such knowledge because the ranch is extensive and hill-covered. The ALJ did not make a finding as to whether or not Conlan was aware that the duplex housed migrant workers, but the ALJ did find that Conlan had knowledge of the intended use of the duplex. The ALJ found that it was unclear whether Conlan had prohibited Marquez from using the duplex if it was not repaired.

---

[1]Marquez, the tenant farmer who gave the migrant workers permission to live in the duplex, was not fined because he qualified as a family farmer and was thus exempt from liability under the MSPA. 29 U.S.C. § 1803(a)(1).

II

An agency's interpretation of a statute is a question of law that we review de novo. *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 783 (9th Cir. 1995). In that review, we ask two questions. First, we determine "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If so, we give force to the "unambiguously expressed intent of Congress." *Id.* at 843. If the statute is silent or ambiguous on a particular point, however, we defer to the agency's interpretation if it is a "permissible construction of the statute." *Id.*

III

In 1982, Congress enacted the MSPA, 29 U.S.C. §§ 1801-1872 (as revised), to protect the health and safety of migrant farm workers. This case of first impression requires the interpretation of sections 1823(a) and 1853(a). Section 1853(a) provides for civil money penalties for violations of the MSPA. It states that "any person who commits a violation of this chapter or any regulation under this chapter, may be assessed a civil money penalty of not more than $1,000 for each violation." Section 1823(a) provides that "each person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for ensuring that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing."

A

[1] Conlan argues that we should interpret section 1853(a) to include a scienter requirement. We disagree. When we construe statutory language, we assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *Buettner v. Kavilco, Inc.*, 860 F.2d 341, 343 (9th Cir.

1988) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)). "We determine the plain meaning of a statute by looking 'to the particular statutory language at issue, as well as the language and design of the statute as a whole.' " *Seldovia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335, 1341 (9th Cir. 1990) (quoting *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988)).

[2] Section 1853(a) does not contain scienter language. "Any person who commits a violation" may be assessed a penalty. 29 U.S.C. § 1853(a). Had Congress intended a scienter requirement, it could easily have said so as it did in other sections of the MSPA. For example, the MSPA's criminal enforcement provision, 29 U.S.C. § 1851(a), requires a showing that a person "willfully and knowingly" violated the Act before criminal penalties will be imposed. Likewise, the MSPA's private right of action provision, 29 U.S.C. § 1854(c)(1), requires a showing that the defendant "intentionally" violated a provision of the MSPA before damages can be awarded. Congress knew how to require scienter when it wanted to, and "[i]n the face of such obvious congressional action we will not write something into the statute which Congress so plainly left out." *U.S. v. Hoflin*, 880 F.2d 1033, 1038 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990).

B

[3] Before strict liability attaches under section 1853(a), a person must have violated a provision of the MSPA. Conlan was fined under section 1853(a) for having violated section 1823(a).The DOL interpreted section 1823(a) to allow imposition of liability upon finding that a person is an owner of a substandard facility or real property upon which migrant workers reside. According to the DOL interpretation, if a person is such an owner, and the facility or real property is substandard, that person has committed a violation. It is undisputed that Conlan owned the facility, the duplex, and the

real property, the camp, that were used by the migrant workers as housing. It is also undisputed that the housing was substandard. Thus, according to the DOL, Conlan was correctly penalized.

[4] Under the DOL's interpretation, the liability possibilities are incredible. If a migrant worker slept on a bench in a city park, the city could be penalized because the bench did not comply with applicable safety and health standards. Likewise, a person living in California who owned a vacation ranch in Montana could be penalized if migrant workers trespassed upon that person's land and set up a camp, despite his lack of knowledge of or consent to the camp. Such results are not supported by the plain language of the statute.

[5] In addition to requiring a "person who owns or controls" a substandard "facility or real property," section 1823(a) requires that the facility or real property be "used as housing for migrant agricultural workers." The DOL argues that because the migrant workers were using Conlan's property as housing, this requirement was met. The DOL, however, misreads this requirement. Section 1823(a) says "used as housing *for* migrant agricultural workers" not "used as housing *by* migrant agricultural workers." The plain meaning of the preposition "for" is that the housing must be provided to the migrant agricultural workers by someone other than themselves. The owner of the facility or property need not use it to house the workers, but someone in control of the facility or property must.

[6] Conlan was correctly penalized for the substandard conditions found at the duplex. Conlan owned the facility, the facility did not comply with applicable safety and health standards, and the facility was used by Marquez "as housing *for*" migrant workers. Conlan violated section 1823(a) and as such was strictly liable for civil penalties under section 1853(a).

[7] Conlan was improperly penalized, however, for the housing conditions at the unauthorized camp. Conlan owned

the real property on which the camp was situated and the housing conditions were substandard, but there is no evidence in the record that anybody other than the migrant workers themselves provided the housing in which they lived.

[8] It is clear that Conlan did not provide the housing. The ALJ found that there was no evidence that Conlan knew of the unauthorized camp and that it could not be inferred that Conlan had such knowledge because the ranch is extensive and hill-covered. Without at least actual or implied knowledge that the migrant workers were camped on his property, Conlan cannot be said to have used his real property for housing migrant workers. There may be circumstances in which someone who controls real property or a facility can be said to be using it to house migrant workers although the workers initially trespassed on the land. *See, e.g., Avila v. A. Sam & Sons*, 856 F. Supp. 763 (W.D.N.Y. 1994) (holding agricultural employer violated section 1823(a) when migrant workers slept outside and in a van on premises because employer was aware of the housing violations and allowed the migrant workers to stay), *aff'd*, 60 F.3d 812 (2d Cir. 1995) (unpublished disposition). When one in good faith is unaware of the presence of migrant workers, however, he cannot, in the plain meaning of the phrase, be said to be using real property or a facility "as housing *for*" migrant workers.

[9] It also cannot be said that Conlan's tenant farmers housed the migrant workers in the camp. There is no evidence in the record that one of Conlan's tenant farmers used the real property at issue as housing for the migrant workers.

IV

Because the meanings of sections 1853(a) and 1823(a) are clear, Conlan's argument that they are unconstitutionally vague fails. Conlan argues that these sections must be interpreted as including a scienter requirement to avoid being unconstitutionally vague.

A challenge to the constitutionality of a federal statute is reviewed de novo. *Moser v. FCC*, 46 F.3d 970, 973 (9th Cir.), *cert. denied*, 115 S. Ct. 2615 (1995). "To pass constitutional muster against a vagueness attack, a statute must give a person of ordinary intelligence adequate notice of the conduct it proscribes." *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 829 (9th Cir. 1989). A statute providing for civil penalties is "reviewed with somewhat 'greater tolerance' than one involving criminal penalties." *Id.*

[10] Sections 1853(a) and 1823(a) are not unconstitutionally vague. Section 1853(a) plainly does not contain scienter language, while other provisions of the MSPA do, and thus, Conlan was adequately warned that scienter was not required. Section 1823(a) plainly requires the owner of a facility or real property that is "used as housing for migrant agricultural workers" to ensure that the facility or real property complies with applicable safety and health standards. Section 1823(a) does not require that the owner know that migrants are living on his property. It simply, and plainly, requires that the owner or someone else with the right to control the property use it for housing migrant workers. Conlan was adequately warned that to avoid liability under section 1823(a), he was required to prevent his tenant farmers from using his facilities or real property to house migrant workers under substandard living conditions.

V

[11] The district court's order affirming the final decision of the Secretary of Labor is affirmed in part and reversed in part. We affirm the order in so far as it affirms the finding of a violation at the duplex, but we reverse the affirmance of the finding of violations at the unauthorized camp. We remand to

the district court for elimination of that portion of the penalty attributable to the conditions at the unauthorized camp.[2]

AFFIRMED in part; REVERSED in part and REMANDED.

[2]We note that section 1853(a) limits the authorized civil money penalty to "not more than $1,000 for each violation." Conlan has not appealed the calculation of his penalty.

APPENDIX E

[Filed April 4, 1996]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GARTH CONLAN,	)	No. 94-15878
	)	
Plaintiff-Appellant,	)	D.C. No. CV-93-20226-RMW
	)	
v.	)	
	)	
UNITED STATES DEPARTMENT OF LABOR,	)	ORDER
	)	
Defendant-Appellee.	)	
	)	

Before: NORRIS, BEEZER AND TROTT, Circuit Judges

Appellant's petition for rehearing is DENIED.

BARTKO, ZANKEL, TARRANT & MILLER

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES DEPARTMENT OF LABOR
Plaintiff-Appellee,

v.

GARTH G. CONLAN
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMICUS CURIAE BRIEF OF WESTERN GROWERS ASSOCIATION

ROBERT W. MYERS, State Bar No. 89898
WESTERN LEGAL ASSOCIATES
17620 FITCH STREET
IRVINE, CALIFORNIA 92714
TELEPHONE: 714-863-0266

ATTORNEYS FOR
WESTERN GROWERS ASSOCIATION

INTRODUCTION

Pursuant to the Court's grant of their Motion for Leave to File Brief Amicus Curiae in Support of Appellant, Western Growers Association ("Amicus Curiae") hereby file this Brief in support of Appellant, Garth G. Conlan.

I

BACKGROUND

On August 11, 1988, the United States Department of Labor, and several other government agencies raided a large tract of land owned by Appellant Garth Conlan. Based on that search, the Department of Labor assessed a civil penalty against Conlan and his wife totaling $23,250 for housing violations under the Migrant and Seasonal Agricultural Worker Protection Act ("MSPA"), 29 U.S.C. 1823(a). These penalties were contested and the case was referred to an Administrative Law Judge for hearing. Despite the finding that there was no evidence showing that Conlan had knowledge that his property was being used to house migrant workers, the ALJ found a violation of Section 1823 (a) of the Migrant and Seasonal Agricultural Worker protection Act, 29 U.S.C. 1801 et seq.

A timely appeal followed and an Order Affirming Decision of the Administrative Law Judge issued from United States District Court Judge Whyte on April 18, 1994.

ISSUES ON APPEAL

Three issues have been presented for appeal:

1. Under 29 U.S.C. 1823 (a) of the MSPA 29 U.S.C. 1801 et seq. is a landowner liable for alleged substandard housing and conditions on his property even though the landowner had no knowledge that the property was being used to house migrant agricultural workers?

2. Does substantial evidence support the ALJ's finding that the occupants of the housing were migrant agricultural workers?

3. Were the penalties assessed for the violations excessive in the light of lack of knowledge of the landowner?

III

ARGUMENT

A LANDOWNER WHO IS WITHOUT KNOWLEDGE THAT MIGRANT AGRICULTURAL WORKERS ARE LIVING ON HIS LAND OR ARE RESIDING ON IT CONTRARY TO THE PROVISIONS OF A LEASE, BEARS NO RESPONSIBILITY FOR MSPA VIOLATIONS UNDER SECTION 1823 (a) OF THE MSPA

Section 1823 (a) of the MSPA, 29 U.S.C. 1801 et seq. reads in pertinent part as follows:

> "[E]ach person who owns or controls a facility or real property which is used as housing for migrant agricultural workers shall be responsible for ensuring

that the facility or real property complies with substantive Federal and State safety and health standards applicable to that housing."

Appellant's position is that he can not be held liable for a violation of Section 1823 (a) unless it is proved that he had knowledge of the migrant worker housing on his property. In interpreting the relevant statute, the plain meaning rule states that if the statute is clear on its face then there is no need to resort to legislative history. U.S. v. Neville, 985 F2nd 992 995 (Ninth Circuit 1993). The use of the word "for" in Section 1823 (a) indicates that the owner of real property must have some knowledge that the housing is to be used by migrant agricultural workers. Otherwise, Congress would have employed the language "used by migrant agricultural workers" if it intended that a landowner be liable for housing erected by trespassers. It is undisputed at this point that Conlan was totally unaware of any housing on his property, other than the one dwelling, and as to that particular house, he specifically denied permission to use it until it was brought up to safety code standards.

Even if one assumes that the statute in question is in need of interpretation through resort to looking at the legislative history; that analysis supports the argument that Section 1823 (a) requires knowledge on the part of the landowner prior to a finding of violation. The Congressional Record contains a quote from then Deputy Undersecretary of Labor Robert Collyer:

> "The bill would also expand the protections relating to housing for migrant agricultural workers. For example, when more that one entity is involved in providing the housing, such as when the grower owns it and the farm labor contractor operates it, both will be responsible for

the safety and adequacy of the housing. This is a significant change from the present law which fixes responsibility only on the farm labor contractor who may or may not own the housing." 97 Congressional Record 11749 (September 17, 1992. (Emphasis added.)

The use of the word "providing" implies that the landowner has knowledge that the housing in question is being used by migrant agricultural workers.

The position taken by the Department of labor in imposing strict liability under this statute, would lead to the imposition of an onerous new duty on landowners to search their properties constantly to make certain that no migrant agricultural worker has trespassed and camped overnight on their property. Support for such an extreme result, as adopted by the District Court, cannot be found in either the statute itself or any legislative history. Certainly, such a radical departure from fundamental notions of due process and fairness requires firm guidance in either the statute or its legislative history.

IV

THE ADMINISTRATIVE LAW JUDGE'S FINDING THAT THE OCCUPANTS OF THE SUBSTANDARD HOUSING ON CONLAN'S PROPERTY WERE MIGRANT AGRICULTURAL WORKERS AS DEFINED IN THE MIGRANT AND SEASONAL WORKER PROTECTION ACT IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

In order to find a violation of Section 1823 (a), it is necessary to prove that the applicable housing is used by migrant agricultural workers. Section 3 of the MSPA defines

migrant agricultural worker as an individual "who is employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent from his permanent place of residence." The burden of proving that the housing facilities in question were actually used by persons meeting the above definition, is on the U.S. Department of Labor.

As is evident from the Decision of the Administrative Law Judge, page 12, the evidence provided on this issue was sketchy. The U.S. Department of Labor provided testimony that one person was apprehended on the property - not necessarily living in the "housing" - who was allegedly an illegal alien. Permanent place of residence for a non-immigrant alien is defined by the regulations as that individual's country of origin. Thus, it is possible to conclude, although it is surely not a fact, that a person who was picked up by the border patrol is a "non-immigrant alien", and therefore, was absent from his permanent place of residence. There is no proof, however, that this individual was in fact an agricultural worker-seasonal, temporary, or otherwise - or that he lived on the Conlan property.

Similarly, the U.S. Department of Labor presented hearsay evidence in the form of seven written statements, signed by persons who stated that they worked on the property picking strawberries. According to the Administrative Law Judge, only three of these seven individuals state in their declarations that they occupied housing on the property (two under the trees and one in the permanent house) and that they are from Mexico. In this case, however, it is difficult to conclude that these three were indeed "non-immigrant aliens", particularly since they apparently were not deported. Thus, it is possible, particularly in the case of the person in the "permanent house", that these three persons were not absent overnight from their permanent

place of residence, in which case they are not migrant workers.

In addition, the statements do not address the exclusions in the regulations relating to the definition of "migrant worker' or "seasonal work", nor was Appellant provided with the opportunity to cross-examine the declarants. For instance, "migrant agricultural worker" does include "any immediate family member of an agricultural employer or farm labor contractor". [29CFR 500.20 (p)] The regulations also provide that "agricultural field work" does not include "an individual operating a machine", such as a tractor. [29 CFR 500.20 (r)(2)(ii)] Similarly, "on a seasonal or other temporary basis" does not include the employment of foreman or employees who work on a year-round basis in a job that is not "primarily field work". [29 CFR 500.20 (r) (iii), (iv), (v)]

In short, and considering the gaps in the government's evidence, the Department of Labor simply did not prove its case by a preponderance of reliable evidence.

V

THE FINES ARE EXCESSIVE, CONSIDERING CONLAN'S LACK OF KNOWLEDGE OF THE DEFICIENCIES, HIS QUICK REMEDIAL ACTION, AND HIS PAST HISTORY OF COMPLIANCE.

It is clear from the Administrative Law Judge's decision that Garth Conlan took quick action to remedy the housing problems, once he was informed of them. Similarly, there is not question that he has a clear record of compliance. All of these considerations, as well as his status as a landowner ignorant of the alleged violations and the fact that only three individuals were even remotely involved in the alleged violations, should

mitigate against the huge fine assessed by the Department of Labor. In addition, it is significant that the violations have been expanded to increase the fine by the simple use of subparts to the regulations.

In particular, MSPA states that a civil penalty of not more that $1,000 may be assessed "for each violation" of "the Act or any regulations". As is apparent from the list of violations noted on pages 3-8 of the Administrative Law Judge's decision, the Government has carried its interpretation of "for each violation" to the extreme. Fines should not be imposed for every single line of regulations; rather, they should be limited to one fine for 20 CFR 654.404, and another fine for 20 CFR 654.405. To do otherwise will remove all meaning from the statute itself.

VI

CONCLUSION

In sum, Western Growers Association respectfully submits that the decision of the District Court should be reversed, because it is inequitable and contrary to the intent and wording of Migrant and Seasonal Worker Protection Act.

Date: September 30, 1994

Respectfully submitted,
WESTERN LEGAL ASSOCIATES

By /s/ Robert W. Myers
ROBERT W. MYERS
Attorneys for
WESTERN GROWERS ASSOCIATION